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Date: May 20, 2010

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Subject : The Delta Stewardship Council's "Responsible Agency" Role Regarding the Bay Delta Conservation Plan

I. INTRODUCTION

Senate Bill 1 (SB 1) designates the Delta Stewardship Council (Council) as a responsible agency with respect to the Department of Water Resources' (DWR's) preparation of an environmental impact report (EIR) for the Bay Delta Conservation Plan (BDCP) pursuant to the California Environmental Quality Act (CEQA). (Water Code, § 85320, subd. (c).) As you requested, this memorandum analyzes the significance of the Council's designation as a responsible agency as to the BDCP EIR.

II. BACKGROUND

A. The Ongoing BDCP Process

The BDCP process was initiated several years ago by various public water agencies as a "collaborative approach to restore the delta ecosystem and protect water supplies." (*BDCP: An Overview and Update*, Mar. 2009.)¹ The overarching goal of the BDCP process is "to formulate a plan that could ultimately be approved by" federal and state wildlife agencies as a habitat conservation plan (HCP) under section 10 of the federal Endangered Species Act (ESA)² and a natural community conservation plan (NCCP) under the California National Community Conservation Planning Act (NCCPA) (or alternatively, a mitigation plan pursuant to section 2081 of the Fish and Game Code, part of the California Endangered Species Act, CESA).³

¹ All of the documents cited in this section are available on the BDCP website, <http://baydeltaconservationplan.com>.

² 16 U.S.C. § 1539(a).

³ The NCCPA is codified at Fish and Game Code sections 2800 et seq., and CESA is codified at Fish and Game Code sections 2050 et seq.

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(Frequently Asked Questions About the BDCP EIR/EIS; Planning Agreement Regarding the BDCP, Oct. 6, 2006, as amended Mar. 3, 2009, pp. 8-9 (hereafter “BDCP Planning Agreement”).) The BDCP will apply to the statutory delta, with some exceptions. *(BDCP Planning Agreement, p. 11.)*

If the BDCP is approved by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) as a HCP, and by DFG as a NCCP and/or a section 2081 mitigation plan, then these agencies would issue “incidental take permits” under the ESA and the NCCPA and/or CESA. The permits would authorize state and local government agencies and private parties participating in the BDCP to “take”⁴ federally- and state- listed endangered, threatened and other species specifically “covered” by the BDCP. This take would be authorized in connection with specified activities, including operations of the State Water Project (SWP) and construction of certain new SWP infrastructure, which also would be specifically “covered” by the BDCP. *(BDCP Planning Agreement, pp. 8-9, 16-17.)* In addition, the FWS and NMFS would engage in consultation with the U.S. Bureau of Reclamation (Bureau) and issue biological opinions and accompanying “incidental take statements” pursuant to section 7 of the federal ESA⁵ authorizing the Bureau and certain federally-regulated entities to take federally-listed species in connection with operation of the federal Central Valley Project (CVP) and other covered federal activities. *(Id.)*

As the BDCP “Overview and Update” document dated March 2009 explains:

As an [HCP/NCCP] under federal and state law, respectively, the purpose of the [BDCP] is to provide for the conservation of threatened and endangered fish species in the Delta and to improve the reliability of the water supply system within a stable regulatory framework. When adopted and approved by the federal and state fishery agencies, it will result in the issuance of long-term permits for those activities that support water supply and power generation.

(BDCP, An Overview and Update, Mar. 2009.)

The BDCP Planning Agreement⁶ provides for a “Steering Committee” to “assist in the development of the BDCP” and to serve as “the principal forum within which key policy and

⁴ “Take” is defined somewhat differently under federal and state law; however both the federal ESA and the California Fish and Game Code define “take” to include death of individual members of a species. (16 U.S.C. § 1532(19); Fish & Game Code, § 86.)

⁵ 16 U.S.C. § 1536.

⁶ The Planning Agreement was executed by the California Resources Agency, DFG, FWS, NMFS, DWR, Bureau, Metropolitan Water District, Kern County Water Agency, Santa Clara Valley Water District, Alameda County Flood Control and Water Conservation District, San

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strategy issues pertaining to the BDCP will be discussed and considered.” (*BDCP Planning Agreement*, p. 14.) Steering Committee decisions are preliminary, and not legally binding. (*Id.* at p. 15.) Members currently include all of the signatories to the Planning Agreement, plus the California Bay Delta Authority, State Water Resources Control Board and the U.S. Army Corps of Engineers.

The BDCP Steering Committee has agreed that:

[T]he most promising approach for achieving the BDCP conservation and water supply goals involves a conveyance system with new points of diversion, the ultimate acceptability of which will turn on important design, operational and institutional arrangements that the Steering Committee will develop and evaluate through the planning process. The main new physical feature of this conveyance system includes the construction and operation of a new point (or points) of diversion in the north Delta on the Sacramento River and an isolated conveyance facility around the Delta.

(*The BDCP: Points of Agreement for Continuing Into the Planning Process*, p. 3, Nov. 16, 2007.)

Concurrently with development of a draft BDCP, federal and state agencies have commenced the environmental review process for the plan pursuant to the National Environmental Policy Act (NEPA) and CEQA. DWR is the lead agency under CEQA, and issued a Notice of Preparation of an EIR for the BDCP on February 13, 2009. (*DWR Revised Notice of Preparation for EIR/EIS for the BDCP*, State Clearinghouse No. 2008032062, Feb. 13, 2009.) The Bureau, FWS and NMFS are the co-lead agencies under NEPA, and likewise issued a Notice of Intent to prepare an EIS for the BDCP on February 13, 2009. (74 Fed. Reg. 7257 (Feb. 13, 2009).) The EIR and EIS will be prepared as a joint document.

Both the state Notice of Preparation and the federal Notice of Intent describe the purposes of the BDCP to include, *inter alia*, “[t]he operation of existing SWP Delta facilities and construction and operation of facilities for the movement of water entering the Delta from the Sacramento Valley watershed to the existing SWP and CVP pumping plants located in the southern Delta.” (NOP, p. 3; 74 Fed.Reg. at p. 7258.) The purposes of the BDCP also include “[p]roviding for the conservation and management of covered species through actions within the BDCP Planning Area that will contribute to the recovery of the species” and “[p]rotecting, restoring and enhancing certain aquatic, riparian, and associated terrestrial natural communities and ecosystems.” (*Id.*) Covered activities will include, *inter alia*: (1) “[e]xisting Delta

Luis and Delta-Mendota Water Authority, Westlands Water District, Contra Costa Water District, North Delta Water Agency, Friant Water Authority, Mirant Delta Corporation, American Rivers, The Bay Institute, California Farm Bureau Federation, Defenders of Wildlife, Environmental Defense Fund, Nature Conservancy, and the Natural Heritage Institute.

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conveyance elements and operations of the CVP and SWP;” (2) “[n]ew Delta conveyance facilities . . . and operations of the CVP and SWP generally described in the BDCP November 2007 Points of Agreement;” (3) “[f]acility improvements of the CVP and SWP within the statutory Delta;” and (4) implementation of a variety of conservation measures included in the BDCP. (NOP, p. 4; 74 Fed.Reg. at p. 7259.)

The federal and state lead agencies completed the scoping process for the BDCP EIS/EIR in March of 2009, and are now in the process of preparing a draft BDCP for public review. According to the BDCP website, the lead agencies currently anticipate releasing a draft plan and draft EIS/EIR for public review by late summer of 2010.

B. SB 1 and the BDCP

Meanwhile, Governor Schwarzenegger signed and filed SB 1 on November 12, 2009, and it became effective on February 3, 2010. SB 1 established the Council as the successor to the California Bay Delta Authority and included certain provisions concerning the Council’s role vis-à-vis the BDCP. (Water Code, §§ 85034, 85200, 85320 et seq.) Specifically relevant to this memorandum, SB 1 does the following:

- 1) Establishes several new policies governing management of the delta and the Council’s actions (Water Code, §§ 85020-85023), including the overarching requirement that the delta be managed to achieve the “co-equal goals” of “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem” (Water Code, §§ 85001, subd. (c), 85020, 85054);
- 2) Requires the Council, on or before January 1, 2012, to develop a Delta Plan that furthers the statute’s co-equal goals, as well as specified subgoals and strategies (Water Code, §§ 85300, 85302-85308);
- 3) Establishes a process by which state and local government approvals of certain “covered actions,” as defined, may be appealed to the Council for a determination as to whether the covered action is consistent with the Delta Plan (Water Code, §§ 85022, 85057.5, 85225 et seq.);
- 4) Requires the Council to consider incorporating the BDCP into the Delta Plan if the BDCP complies with CEQA and the NCCPA. (Water Code, § 85320, subds. (a) and (b));
- 5) Requires that, to be considered for inclusion, the CEQA EIR must include “a comprehensive review and analysis of” seven specifically described items concerning flow and other operational criteria, conveyance alternatives, climate change, fish and aquatic resources, flood management, natural disasters and Delta water quality;⁷

⁷ Water Code section 85320(b)(2) contains the following list of items that the EIR must compressively review and analyze:

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- 6) Requires DWR to consult with the Council in developing the BDCP and provides that the Council is a “responsible agency in the development of” the BDCP EIR (Water Code, § 85320, subd. (c));
- 7) Mandates that the Council incorporate the BDCP into the Delta Plan if DFG approves the BDCP as an NCCP and determines that the BDCP meets the requirements of section 85320 and the FWS/NMFS also approve the BDCP as an HCP under the federal ESA (Water Code, § 85320, subd. (e));
- 8) Allows DFG’s determination that the BDCP has met the requirements of section 85320 to be appealed to the Council (Water Code, § 85320, subd. (e)); and
- 9) Allows the Council to make recommendations to the BDCP “implementing agencies” regarding BDCP implementation (Water Code, § 85320, subd. (g)).

III. COUNCIL’S ROLE AS A CEQA RESPONSIBLE AGENCY FOR THE BDCP EIR

As mentioned, under CEQA, DWR is the “lead agency” for preparation of the BDCP EIR. The CEQA statute and Guidelines define a “lead agency” as “the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.” (Pub. Resources Code, § 21067; Cal. Code Regs., tit. 14, § 15367.) In contrast, SB 1 expressly designates the Council as “a responsible agency in the development of” the BDCP EIR. (Water Code, § 85320, subd. (c).) CEQA defines a “responsible agency” as “a public agency, other than the lead agency, which has responsibility for carrying out or approving a project.” (Pub. Resources Code, § 21069.) Responsible agencies “include all public agencies other than the lead agency which have discretionary approval power over the project.” (Cal. Code Regs., tit. 14, § 15381.)

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- A) A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820 of the Fish and Game Code, and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.
 - (B) A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines.
 - (C) The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report.
 - (D) The potential effects on migratory fish and aquatic resources.
 - (E) The potential effects on Sacramento River and San Joaquin River flood management.
 - (F) The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.
 - (G) The potential effects of each Delta conveyance alternative on Delta water quality.

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Each responsible agency independently must consider the lead agency's EIR "prior to acting upon or approving the project." (Cal. Code Regs., tit. 14, §§ 15050, subd. (b), 15096, subd. (f); *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 443 n. 8, 444.) However, a responsible agency's authority to require changes to and mitigation measures for the project is more limited than that of a lead agency. A lead agency has authority to disapprove or to "require feasible changes in *any or all activities* involved in the project in order to substantially lessen or avoid" significant environmental effects. (Pub. Resources Code, § 21002.1, subd. (d); Cal. Code Regs., tit. 14, §§ 15041, subd. (a), 15042, emphasis added.) A responsible agency, by contrast, may only disapprove or require changes in a project that will reduce or avoid the direct or indirect effects of those aspect(s) or part(s) of the project which the responsible agency "is required by law to carry out or approve." (Pub. Resources Code, § 21002.1, subd. (d); Cal. Code Regs., tit. 14, §§ 15041, subd. (b), 15042, 15096, subd. (g)(1).)

In the Council's case, its approval authority regarding the BDCP is somewhat unorthodox. Rather than directly approving the BDCP, under SB 1 the Council hears appeals challenging, among other things, DFG's approval of the plan as an NCCP and its determination that the plan EIR complies with CEQA. (Water Code, § 85320, subd. (e).) In essence, the Council is a unique, statutorily-designated "responsible agency" that does not necessarily have the kind of direct "approval authority" over the project in question (i.e. the BDCP itself) that is typically the case for responsible agencies under CEQA. With the Council's unique role in mind, we will now turn to specific actions that the Council can take concerning the CEQA process.

A. Council Response to Notice of Preparation of BDCP EIR

DWR is required to send a copy of the notice of preparation of the BDCP EIR to each responsible agency and to notify each responsible agency of any EIR scoping meetings. (Pub. Resources Code, §§ 21080.4, subd. (a), 21083.9, subd. (b)(2); Cal. Code Regs., tit. 14, § 15082, subd. (a).) The Council has the authority as a responsible agency to prepare comments in response to DWR's notice of preparation. Public Resources Code section 21080.4, subdivision (a) provides that "[u]pon receipt of the notice, each responsible agency . . . shall specify to the lead agency the scope and content of the environmental information that is germane to the statutory responsibilities of that responsible agency . . . in connection with the proposed projects and which, pursuant to the requirements of this division, shall be included in the [EIR]." (Pub. Resources Code, § 21080.4, subd. (a); see also Cal. Code Regs., tit. 14, § 15082, subd. (b).)

A responsible agency's comments in response to a notice of preparation must be specific and must be related to the responsible agency's "area of statutory responsibility" -- a "generalized list of concerns not related to the specific project" will not suffice. (Cal. Code Regs., tit. 14, § 15082, subs. (b) and (b)(3).) The response must identify the significant environmental issues and reasonable alternatives and mitigation measures that the responsible agency "will need to have explored in the draft EIR." (*Id.*, subd. (b)(1).) Here, Council comments in response to DWR's notice of preparation would appropriately focus on the CEQA

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criteria specified in Water Code section 85320, subdivision (b). These criteria include the requirements that the draft BDCP EIR complies with CEQA and that it contains a comprehensive review and analysis of the seven specific items listed in footnote seven of this memorandum. (Water Code, § 85320, subdivision (b)(2).)

Generally, a responsible agency must provide written comments in response to the notice of preparation to the lead agency in writing not later than 30 days after the responsible agency's receipt of the notice. (Pub. Resources Code, § 21080.4, subd. (a); Cal. Code Regs., tit. 14, §§ 15082, subd. (b), 15103.) In this case, DWR issued its notice of preparation for the BDCP EIR on February 13, 2009 but did not send the notice to the Council because the Council was not then in existence. Given the Council's statutory role as responsible agency, however, the Legislature presumably intended it to have the ability to provide DWR with input concerning the proper scope of the BDCP EIR. The Council therefore may wish to request a meeting with DWR and possibly other responsible and trustee agencies to discuss the best way for the Council to provide that input. (See Pub. Resources Code, § 21080.4, subd. (b); Cal. Code Regs., tit. 14, § 15082, subd. (c).)

B. Council Comments on Draft BDCP EIR

Because the BDCP is a project of statewide, regional or areawide significance (see Cal. Code Regs., tit. 14, § 15206) and is subject to state agency review, DWR must provide a minimum 45 day state agency and public review period for the draft BDCP EIR. (Pub. Resources Code, § 21091, subd. (a); Cal. Code Regs., tit. 14, § 15205, subd. (c).) DWR must consult with and request comments from the Council on the draft BDCP EIR. (Pub. Resources Code, § 21104, subd. (a); Cal. Code Regs., tit. 14, § 15086, subd. (a).)⁸ The Council may submit comments on the draft EIR "regarding those activities involved in [the] project that are within an area of [the Council's] expertise," that "are required to be carried out or approved" by the Council, or that are otherwise "germane to that agency's statutory responsibility." (Pub. Resources Code, § 21104, subd. (c); Cal. Code Regs., tit. 14, §§ 15086, subd. (c), 15096, subd. (d), 15204, subd. (d).)

Because Water Code section 85320, subdivision (b)(2) requires the Council to find that the BDCP EIR "complies with CEQA," the Council may make wide-ranging comments regarding the adequacy of the BDCP EIR under CEQA. However, the Council's comments must be "supported by specific documentation." (Cal. Code Regs., tit. 14, §§ 15086, subd. (c), 15096, subd. (d).) Comments "should focus on any shortcomings in the EIR, . . . or on

⁸ Note that SB1 anticipates a Council participation in the creation of the BDCP that is arguably even more robust than its responsible agency involvement. Under SB1, DWR "shall consult with the council . . . during the development of the BDCP." (Water Code, § 85320, subd. (c).) Given that role, as well as its designation as a responsible agency, the Council may wish to participate in BDCP Steering Committee meetings as an active observer and to provide other consulting input as parties develop the BDCP.

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additional alternatives or mitigation measures which the EIR should include” that would avoid or mitigate significant environmental effects. (*Id.*, §§ 15096, subd. (d), 15204, subd. (a).)

If the Council identifies what it considers to be any significant environmental effect(s), it must advise DWR of those effects prior to the close of the public review period on the draft EIR. (Cal. Code Regs., tit. 14, § 15086, subd. (d).) The Council also may submit proposed mitigation measures to address these significant effects. (*Id.*, § 15204, subd. (f); Pub. Resources Code, § 21081.6, subd. (c).)

If the Council submits proposed mitigation measures, it must either: (1) submit to DWR “complete and detailed performance objectives for mitigation measures addressing those effects” or (2) “refer [DWR] to appropriate, readily available guidelines or reference documents concerning mitigation measures.” (Cal. Code Regs., tit. 14, §§ 15086, subd. (d), 15204, subd. (f); Pub. Resources Code, § 21081.6, subd. (c).) If the Council is not aware of any mitigation measures to address the identified effects, it shall so state. (Cal. Code Regs., tit. 14, § 15086, subd. (d).)

If the Council chooses not to submit comments on the draft BDCP EIR, DWR may presume that the Council has no comments to make. (Cal. Code Regs., tit. 14, § 15207.)

C. Council Consideration of and Findings Regarding Final BDCP EIR

“A responsible agency complies with CEQA by considering the EIR . . . prepared by the lead agency and by reaching its own conclusions on whether and how to approve the project involved.” (Cal. Code Regs., tit. 14, § 15096, subd. (a).) The responsible agency must certify that it “reviewed and considered the information contained in” the EIR prior to approving or carrying out a project. (Cal. Code Regs., tit. 14, §§ 15004, subd. (a), 15025, subd. (b), 15050, subd. (b).)

In addition, prior to approving or carrying out a project, a responsible agency (like a lead agency) must make one or more of the following findings with respect to each significant effect identified in the EIR that is relevant to the responsible agency’s authority:

- 1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment;
- 2) Changes or alterations that are within another agency’s responsibility or jurisdiction have been, or can and should be, adopted by that other agency; or
- 3) Specific economic, legal, social, technological or other considerations make infeasible the mitigation measures or alternatives identified in the EIR and specific overriding economic, legal, social or technological benefits of the project outweigh its significant environmental effects.

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(Pub. Resources Code, § 21081; Cal. Code Regs., tit. 14, §§ 15004, subd. (a), 15043, 15091, subd. (a), 15093, subd. (a), 15096, subd. (h).) All of the foregoing findings must be supported by substantial evidence in the record. (Pub. Resources Code, § 21081.5; Cal. Code Regs., tit. 14, § 15091, subd. (b), 15093, subd. (b).)

As the California Court of Appeal First Appellate District has stated: “although the lead agency prepares the EIR, the responsible agency must independently make its own findings and conclusions,” and these findings must be supported by a statement of facts. (*Resource Defense Fund v. Local Agency Formation Comn. of Santa Cruz County* (1987) 191 Cal.App.3d 886, 896-897.) The responsible agency’s findings also must include a statement of overriding considerations, if necessary. (*Id.* at pp. 897-898.)

The Council's obligations as a responsible agency reviewing the final BDCP EIR, however, should not require many findings beyond those that it would need to make anyway as part of its appellate review. That is because, in exercising its appellate function to review whether DFG correctly determined that the BDCP and EIR meet the requirements of Water Code section 85320, the Council would already need to decide whether the final EIR complies with CEQA.⁹ The Council would, for example, need to make an independent determination of whether the lead agency (DWR) properly made one or more of the three CEQA findings noted above that are required by Public Resources Code section 21081. If the Council determined that DWR properly made those findings, it could use the same analysis and evidence to support its own parallel findings as a responsible agency.

If the Council upholds DFG’s determination on an appeal, it must file a notice of determination with the Governor’s Office of Planning and Research (OPR) within five working days. (Cal. Code Regs., tit. 14, § 15096, subd. (i).) The notice must state that the Council considered the EIR prepared by DWR, and must otherwise meet the requirements of Public Resources Code section 21108 and Guidelines section 15094.

D. Council Options if BDCP EIR is Inadequate

In general, the final BDCP EIR “shall be conclusively presumed to comply with CEQA for purposes of use by responsible agencies” that were previously consulted regarding the draft EIR unless:

- 1) The EIR is “finally adjudged in a legal proceeding not to comply with the requirements of CEQA”; or

⁹ SB1 would also require the Council to decide, as part of the appeal, whether the BDCP complies with the Natural Community Conservation Planning Act (Chapter 10 of Division 3 of the Fish and Game Code). (See Water Code, § 85320, subd. (b)(1).)

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2) A subsequent EIR is required.¹⁰

(Cal. Code Regs., tit. 14, § 15231; see also Pub. Resources Code, § 21167.2 [lead agency's EIR "shall be conclusively presumed to comply" with CEQA "for purposes of its use by responsible agencies" if no judicial challenge to the final EIR is filed, unless a subsequent EIR is necessary].) As a result, with certain limited exceptions, responsible agencies must generally either accept the lead agency's EIR, or challenge it in court within 30 days of the date that the lead agency files its notice of determination. (Cal. Code Regs., tit. 14, §§ 15052, 15096, subd. (e).)

Under SB 1, however, the Council has an additional option. As previously explained, the Council may review, on appeal, DFG's determination that the BDCP complies with CEQA and other requirements. In that capacity, the Council could find, if warranted by the facts, that the BDCP EIR is inadequate. Although the finding would not invalidate the EIR, under SB 1 it would prevent the BDCP from being incorporated into the Delta Plan, and it would preclude state funding for the public benefits associated with the BDCP. (Water Code, § 85320, subd. (b).)

Please do not hesitate to let us know if you would like any additional information concerning the Council's role under CEQA regarding the BDCP.

¹⁰ A subsequent EIR is required whenever any one or more of the three circumstances specified in Guidelines section 15162, subdivision (a) exists. (Cal. Code Regs., tit. 14, § 15162, subd. (a); see also Pub. Resources Code, § 21166.) Generally, these include: (1) substantial changes are proposed in the project which will require major revisions to the EIR; (2) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions to the EIR; or (3) new information, which was not known and could not have been known at the time the EIR was certified, becomes available. (*Id.*) Guidelines section 15162, subdivision (c) provides that "[i]f after the project is approved, any of the conditions in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any."